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BOARD**

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*Dear Ms. Homer,*

### **Oversight of the Immigration Advice Sector**

The Legal Services Board (LSB) welcomes the opportunity to respond to UKBA's consultation on the future of oversight arrangements in the immigration advice sector. Indeed, as some of the issues you are considering could have a marked impact on the work of the LSB, it will be important for us to be involved in this work as it continues.

As your consultation paper notes, the LSB was established following Royal Assent to the Legal Services Act 2007 (c.29). We are responsible for overseeing regulation of lawyers authorised to undertake reserved legal activities throughout England & Wales. While existing bodies (the "approved regulators") within the new regulatory framework are responsible for direct and day-to-day regulation of authorised persons, the LSB regulates those approved regulators. Our role is, therefore, very much one of oversight.

At present, there are six activities that constitute reserved legal activities. Section 12(1) of the 2007 Act provides that those six activities are:

- (a) the exercise of rights of audience;
- (b) the conduct of litigation;
- (c) reserved instrument activities;
- (d) probate activities;
- (e) notarial activities; and
- (f) the administration of oaths.

Schedule 2 of the Act goes on to explain in more detail what each of those activities mean.

Your present consultation has potentially significant implications for us and links with three important aspects of our own strategic planning:

**First**, when we published our 2009/10 Business Plan on 9 April last, we undertook to commission advice from our Consumer Panel on the extent to which apparent “gaps” in the regulatory system may or may not have an adverse impact on consumers (see paragraph 58). Those gaps include the provision of unregulated advice about legal or quasi-legal matters, or such provision which falls under other regulatory frameworks, as in the case of immigration advice.

**Second**, during the passage of the 2007 Act – and the passage of the Compensation Act 2006 – Ministers made very clear that they expected oversight of the new framework for “claims management” regulation to move to the LSB once it (the LSB) was set up and in a steady state of running. This work involves anything in the fields of advertising and marketing, taking on business, representing a client, handling client money, and handling complaints in any of the specified sectors (which include e.g. personal injury work). So significant elements of the ‘non-reserved advice sector’ look to be moving towards the Legal Services Act framework in due course anyway.

**Third**, and perhaps most importantly, the reforms being introduced under the Legal Services Act to facilitate “Alternative Business Structures” (ABSs) could radically alter the shape of the current legal services and advice sector in its broadest sense. Insofar as consumers and practitioners are concerned, it will be important to ensure that the entire regulatory framework is as seamless as possible, with duplication and overlap minimised or, preferably, eradicated.

Each of these strands of work ties in to our regulatory objectives, fixed by statute, including in relation to improving access to justice. They mean that the LSB will start looking closely at the advice sector generally in the context of preparing our business plan for 2010-11. There is clearly a range of activities that sit in a grey area between formally reserved legal activities (which we will oversee) and other legal-type activities (which at present do not fall within our regulatory framework, unless undertaken by authorised persons in their capacity as such). Our interest in your consultation is therefore obvious. On that basis, I hope that the annexed paper, which seeks to answer some of the questions you pose, will be of help.

I look forward to working with you in future as this important work is developed. It might be useful if my team were to meet with yours at a relatively early stage to ensure that thinking is coherent on all sides.



**CHRIS KENNY**  
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## **Legal Services Board response to UKBA consultation: Oversight of the immigration advice sector**

1. The Legal Services Board (LSB) welcomes the opportunity to respond to UKBA's consultation on the oversight of the immigration and asylum advice and services sector.
2. In its consultation, UKBA pose twelve questions. This submission is intended to answer Questions 10 and 11 – i.e. focusing on the extent (if any) to which there is scope in future years for oversight of legal advisory services in general and immigration and asylum advice and services in particular to fall within the framework established under the Legal Services Act 2007, and so under the oversight of the LSB.
3. In summary, this paper argues that:
  - (a) a body of work is necessary to assess the needs of consumers (and practitioners) across the advice sector throughout the UK; and
  - (b) as certain benefits might obtain, the LSB would in principle be prepared to consider becoming the oversight regulator for England & Wales' immigration and asylum advice services in due course, once our current set-up work has been completed and once the policy merits and practical impact of such change can be considered in greater detail.

### **Immigration and the wider advice sector**

4. There are clear and obvious synergies between the role of immigration and asylum advisors, who advise on immigration and asylum law/practice, and that of other advisors dealing with matters of law. In particular, people who have trouble with immigration issues sometimes also have housing, education, employment and/or other related issues in a 'bundle' of problems. As such, issues are often tackled together as part of that bundle. From the perspective of both consumer benefits and access to justice, it is difficult to argue for regulatory arrangements that impact differently on different parts of what will feel, to the individual consumer, to be a single conversation.
5. While the status of immigration and asylum advice has been looked at in the past, in particular ahead of and during the Parliamentary passage of the Legal Services Bill in 2006/7, the LSB is not aware of any holistic examination of the needs or interests of people seeking advice across the legal – including immigration and asylum – sector.
6. As a statement of principle, the interests of consumers and citizens must be at the forefront of decision-makers' minds when developing regulatory practice and policy. Without such benefit, the point of regulation would be difficult to ascertain. In the absence of a holistic review of the entire sector, non-one can be certain that this overriding principle is met.

## Immigration and the Legal Services Act framework

### *The shorter-term*

7. The desirability and feasibility of incorporating the immigration and asylum advice and services framework within the Legal Services Bill (now Act) framework has been considered by Government before. We understand that complexities like those highlighted in the consultation paper, for example concerning the UK devolution settlement, were cited as reasons not to pursue the matter further at that stage. Before looking at the more principled arguments, however, we are mindful of the practical constraints on us in our early life.
8. The LSB published a wide-ranging and challenging Business Plan in April 2009. That plan sets out how we will meet the core challenges set for us by legislation in our first year of operation. We will need to work hard to achieve what is required in 2009/10 and beyond. Adding additional projects to those the LSB is already committed to looks unmanageable this year, particularly if a lot of detailed analytical work would be required.
9. To that extent, therefore, the LSB would answer UKBA's Question 10 in the negative: immigration advice and services should not become reserved legal activities under the 2007 Act in the immediate future. But we would like to undertake further analysis in 2010/11.

### *The longer-term*

10. Without the constraint of LSB implementation practicalities, the question of what to do with immigration advice in the longer term can become more focused on key principles – and in particular become oriented around the interests of consumers and the wider public interest. Two issues become relevant:
  - (a) The first involves **devolution**: would the UK's devolution settlement mean that UKBA's third option (which would see immigration advice treated as a form of legal advice and regulated – at least in England and Wales – under the LSA07 framework) is difficult or impossible to achieve?
  - (b) If not impossible, the second issue becomes one of **desirability**: to what extent would a merger of the immigration advice and legal services regulatory frameworks promote the interests of consumers and providers, and indeed with the regulatory objectives under the 2007 Act?

### *The devolution question*

11. Immigration and asylum law – and the current Immigration Services Commissioner's framework – applies across the United Kingdom. However, the regulation of legal services is devolved to the relevant territorial authorities. England and Wales have the Legal Services Act framework, while Scotland and Northern Ireland have their own mechanisms. The UKBA consultation paper says (at paragraph 3.8) that:



“...it is important that regulation of the sector is consistent and robust across the UK. The third option, making immigration advice and services a reserved activity under the Legal Services Act, would require a different regulatory framework being adopted in England and Wales from that in Scotland and Northern Ireland. It is not clear what those frameworks would look like in practice and it might be that there would be considerable cost implications in establishing a regulatory scheme in each jurisdiction. A memorandum of understanding would need to be established between each of the jurisdictions to ensure that standards are consistent and to minimise the risk of unscrupulous advisers exploiting the different regulatory approaches.”

12. In the LSB's view, at least on the face of it, the UK devolution settlement should not present any insurmountable hurdles of principle. First, it would be wrong to suggest that the immigration law system is consistent across the UK as things stand. Public funding is administered by relevant territorial authorities; the courts and tribunals are run separately; and the judges are bound to follow their own line of precedent (although in practice there is almost always extremely close connection between the jurisdictions). Some of the biggest immigration advice providers manage to negotiate these distinctions without problem when providing services, for example, in England and Scotland. So a co-ordinated but nonetheless separate regulatory regime needn't necessarily cause any more problems than the current mix of devolved and reserved partners across the UK.
13. Next, there are countless areas of law that are reserved to the British Parliament, rather than being devolved to the territories. So where (for example) a data protection point is litigated, lawyers will advise clients and/or advocate before the courts on the basis of the UK law. But they would fall within the auspices of the relevant regulatory regime (and be held to account accordingly) by virtue of their practise in England and Wales, or Scotland, or Northern Ireland, as the case may be. The same would apply, for example, in relation to consumer protection law, employment law, and equal opportunities/discrimination law.
14. The practicalities of change in the specific case of immigration advice may be relevant – and should be considered. If a new settlement is established in England and Wales, corresponding solutions would also be required for Scotland and Northern Ireland. Options would require careful thought but could include, for example, OISC continuing as a UK-wide administrative body with ring-fenced territorial offices overseen by appropriate organisations. However, there seems to be no theoretical bar and so, subject to further consultation and analysis, the issue becomes one of desirability.

### ***The desirability question***

15. At its root, this question is one of cost/benefit analysis. There may well be cost and complexity involved in reform designed to bring legal advice in general and immigration advice in particular within the wider legal services regulatory framework. But those costs do not appear to have been identified or quantified with any precision. This detailed work should be done if it can be argued plausibly that significant potential benefits may accrue as a result of reform.

16. In terms of potential benefits, consistent regulation of advisors across the board might bring significant reassurance to consumers (some of whom will be especially vulnerable and in need of protection) and the profession. Indeed, recent reforms have already seen a move towards joined-up oversight of the advice sector beyond the boundaries of currently reserved legal activities.
17. The Compensation Act 2006 provides for the regulation of companies and individuals (other than lawyers regulated separately by approved regulators) that provide “claims management services”. Regulation is managed currently by an arms-length team in the Ministry of Justice with day-to-day work outsourced to a trading standards department. However it was envisaged by Parliamentarians on all sides, throughout the passage of that Act and the Legal Services Act, that responsibility for oversight would move to the LSB in due course. Under the 2006 Act, regulated services are defined as anything in the fields of advertising and marketing, taking on business, representing a client, handling client money, and handling complaints, in any of the following areas.
- personal injury;
  - criminal injuries compensation;
  - employment matters;
  - housing disrepair;
  - financial products; and
  - industrial injury disablement benefits.
18. The position of law centres is interesting in this context. Advisors in law centres take on case work in immigration matters, in housing matters, in benefits matters, in employment matters and/or in many other matters. Assuming that oversight of claims management work eventually falls under the oversight of the LSB, why should immigration cases be singled out for special regulation outside the LSB’s remit – particularly where (for example) employment cases turn on matters of UK-wide legislation in the same way that immigration cases do?
19. Potentially, there are also interesting synergies here with the LSB’s work on Alternative Business Structures. Many of the advice centres that exist at the moment are all but full ABS models – entities (often owned and/or managed by non-lawyers) which dispense legal advice and assistance across a range of subject areas. The ABS reforms, which are central to the Legal Services Act’s framework, are likely to increase this trend. Allowing advisors to come together under one roof, removing requirements for separate regulatory regimes to co-exist and so simplifying the lines of accountability could be advantageous for:
- **consumers** – seamless service provision with added advantage, where things go wrong, of potential access to the single portal offered by the new Office for Legal Complaints;
  - **individual advisors** – clarity over the standards against which they will be measured and so greater confidence in the regulatory framework; and
  - **advisory firms and organisations** – potentially cheaper, less bureaucratic and more consistent regulation.



20. These entities could play an increasing role in the access to justice agenda. Clearly, however, there may be disbenefits or difficulties too. Comparing immigration and advice and the currently reserved legal services may not be comparing like with like: the wide scope of what constitutes a regulated immigration service, next to the current narrower ambit of reserved legal activities, will need to be considered in more detail to ensure the two can sit side-by-side in a future framework. That said, immigration advice and claims management services may sit more comfortably together in a regulatory framework.

### ***The conclusion***

21. The issue of immigration advice highlights inconsistent regulation of advice services generally. In the LSB's view, it will be necessary to undertake a thorough strategic review of the sector, taking into account (among other things) the full range of advice services and the pending ABS reforms. Such a review should look to ensure that the interests of consumers – and the public interest more widely – was furthered by any proposed reforms. It would also have to look at how any revised framework should be funded.
22. Without wanting to prejudge the work that is necessary, we think that there might be benefits flowing from a more seamless framework. Accordingly, we would, in principle, be prepared to consider becoming the oversight regulator for England & Wales' immigration and asylum advice services in due course, once our current set-up work has been completed and once the policy merits and practical impact of such change can be considered in greater detail.
23. In that light, we would encourage all interested parties to come together to consider what if any changes are necessary across the piece. For our part, we have already planned to look at these issues with a review the legal services advice sector generally in 2010/11. We would welcome help from our partners here. Clearly, consideration of issues affecting the devolved territories in particular would need to be approached in partnership with relevant interested parties, including devolved administrations, professional and regulatory bodies and judicial representatives. We plan to undertake the necessary analysis – to assess evidence on both desirability and feasibility against clear public and consumer interest criteria – as part of the work we already plan to carry out on reviewing regulatory 'gaps' (see LSB Business Plan 2009/10, para 58).

### **Legal Services Board**

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